13-2043

To Be Argued By:
SARAH P. KARWAN

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 13-2043

UNITED STATES OF AMERICA,
Appellee,

-vs-

JASON BRODSKY, BRUCE, DAIS,
ALANA FIORENTINO,
Defendants,

RALSTON WILLIAMS, aka "Chris,"
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR THE UNITED STATES OF AMERICA

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Statement of Jurisdiction

The United States District Court for the District of Connecticut (Vanessa L. Bryant, J.) had subject matter jurisdiction over this federal criminal prosecution under 18 U.S.C. § 3231. Judgment entered on May 15, 2013. Appendix ("A__") 14. On May 22, 2013, the defendant filed a timely notice of appeal pursuant to Fed. R. App. P. 4(b). A14, A263. This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. 3742(a).

Statement of Issues Presented for Review

I. Does a defendant have standing to challenge the entry by law enforcement into a condominium where he was not an overnight guest, but was merely a casual visitor with no property or possessory connection to the residence?

II. Did the district court clearly err in concluding that the defendant should receive a two-level enhancement for his role in a drug conspiracy where the evidence established that the defendant paid others to sell heroin and directed their activities?

III. Did the district court commit clear error in adopting the detailed factual findings of the Pre-Sentence Report that found the defendant responsible for at least one kilogram of heroin, where those findings were based on specific evidence introduced at trial, including the testimony of two cooperating witnesses?

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Preliminary Statement

Following a four-day trial, a jury sitting in Hartford, Connecticut, found the defendant, Ralston Williams, also known as "Chris," guilty of conspiracy to possess with the intent to distribute heroin, possession with intent to distribute

heroin, and possession with intent to distribute crack cocaine.

The evidence at trial showed that the defendant, together with others, operated a heroin conspiracy in and around New Haven, Connecticut from at least March through September of 2011. The defendant and his co-conspirators would rent hotel rooms with cash, and sell packaged heroin to a regular stream of customers. The defendant regularly used others to assist him in his endeavors by having them rent hotel rooms for him and by having others conduct hand-to-hand heroin transactions with customers.

On appeal, the defendant challenges the district court's denial of his motion to suppress the heroin and crack cocaine seized by law enforcement officers from him on the day of his arrest. As set forth below, however, the district court properly concluded that the defendant lacked standing to challenge the entry into the condominium where the defendant was found because the defendant was merely present in the condominium, had not been an overnight guest there, and had no other interest in the condo.

The defendant also challenges two sentencing determinations made by the district court. First, the defendant argues that the district court improperly applied a two-level Guidelines enhancement based upon the defendant's role as a manger or supervisor in the heroin conspiracy. But as explained below, the district court proper-

ly found that the defendant was a manager, leader or organizer of the heroin conspiracy because the trial testimony established that the defendant directed and employed others in the distribution of drugs.

Second, the defendant challenges the quantity of heroin that the district court concluded was reasonably foreseeable to him from his participation in the heroin conspiracy. There was ample evidence in the record, however, for the district court to conclude that at least one kilogram of heroin was attributable to the defendant. This evidence included the seized narcotics, the testimony of two cooperating witnesses, the observations of law enforcement, and the defendant's tens of thousands of dollars in unexplained wealth.

For all of these reasons, the district court's judgment should be affirmed.

Statement of the Case

The defendant appeals his conviction following trial on three counts related to his participation in a heroin distribution conspiracy. The defendant argues that the district court, the Hon. Vanessa L. Bryant, United States District Judge, improperly denied his pre-trial motion to suppress the heroin and crack cocaine found on him on the day of his arrest. In addition, the defendant appeals the sentence imposed by the district court of 168 months of imprisonment.

The defendant is currently serving the sentence imposed.

A. The offense conduct

1. "JB" dies from heroin overdose

In the evening hours of August 15, 2011, a 25 year-old woman from Milford, identified as JB, died of a heroin overdose.[1] Government Appendix ("GA__") 703-704. JB's cousin, Jason Riendeau, testified at trial that he picked JB up from work on the evening of August 15, 2011 at about 6:00 p.m. GA127-28. He stated that while

[1] Evidence of JB's death was not presented to the jury during the trial, but was presented to the district court during the course of the case, both in connection with the defendant's motion to suppress, and in connection with the sentencing process, as discussed below. Because the indictment did not allege that a death resulted from the use of the charged narcotics, and because the jury was not asked to find this issue, the defendant was subject only to a 20-year maximum term of imprisonment on each count of conviction, *see* 21 U.S.C. 841(b)(1)(C). In particular, the Government did not argue that the defendant should be subjected to a 20-year mandatory minimum due to the "death resulting" provision in § 841. *See Burrage v. United States*, 134 S. Ct. 881, 887 (2014) (holding that the 20-year mandatory minimum for a death resulting from narcotics distribution only applied where issue of death was submitted to jury and found beyond a reasonable doubt).

JB was in his car, she sent a text message to her source of supply for heroin, and arranged to meet. GA129. JB's telephone records confirm that her telephone had contact with telephone number 203-606-7175 at 6:27 p.m. and 6:41 p.m. that evening. Gov't Ex. 5; GA57-61.

Riendeau drove JB to the Best Western Executive Hotel in West Haven, and dropped her off at the lobby area of the hotel. GA130. Video surveillance footage from the Best Western hotel for that night shows that JB entered the hotel, took the elevator to the 5th floor, and entered room 503, where she stayed for approximately three minutes. Gov't Ex. 3; GA52-55. Hotel records confirm that Alana Fiorentino rented room 503 that night, and video surveillance shows that Jason Brodsky stayed in the room overnight. Gov't Exs. 3, 4. The surveillance video also shows suspected heroin customers coming in and out the room throughout the course of the night while Brodsky was still in the room. Gov't Ex. 3; GA55.

Riendeau testified that JB came out of the hotel with several bags of heroin, which they used. GA131-32. JB's body was found the next morning in her house. GA704. An autopsy performed by the State Medical Examiner's office concluded that JB died from opiate toxicity. *See* Gov't Ex. 16.

On August 16, 2011, Milford Police responded to JB's house to investigate her untimely death.

GA703-704. Inside of JB's purse, officers located hypodermic needles, cotton swabs, used soiled cotton fibers, and wax folds containing suspected heroin. GA712-20; Gov't Ex. 1-A, 1J, 1-L (photographs of contents), Gov't Ex. 2A (syringes, cotton swabs, used cotton material, and wax folds). Police seized eight wax folds of heroin—five full closed packets of heroin stamped "Takers," two packets that appeared to have been opened stamped "Takers," and one open packet stamped "Roadkill." GA719-20.

2. Investigation connects the heroin that caused JB's death to the defendant

In early September, based on information from the Best Western, DEA agents obtained arrest warrants for Fiorentino and Brodsky. GA65-66, GA85. They arrested Fiorentino on September 7, 2011, GA66, and she immediately agreed to cooperate with the investigation, GA67. Fiorentino explained that she had been buying heroin from Brodsky and "Chris" (later identified as the defendant, Ralston Williams) for a period of time. GA162-63. Fiorentino explained that she would call the "work phone," telephone number, 203-606-7175 (the same number from JB's telephone), to reach either Brodsky or the defendant when she needed heroin. GA170-71.

Indeed, Fiorentino's use of that number eventually led to the defendant's arrest. In the pres-

ence of DEA agents, Fiorentino placed a recorded call to telephone number 203-606-7175. Gov't Ex. 7; GA67-69. The defendant answered the call. GA70, GA209. Fiorentino told him that she needed to see him, which she testified meant that she wanted to pick up heroin from him. GA210. The defendant told Fiorentino to meet him at "Bruce's" condominium, which was in a condominium complex near Quinnipiac Avenue in New Haven. GA210-11, GA71-71, GA74.

Fiorentino then drove with DEA agents to the condominium complex at 40 Foxon Drive in New Haven. GA72-73. There, multiple agents saw a person later identified as Bruce Dais coming to and from Unit 14E and conducting what appeared to be hand-to-hand drug transactions with a number of vehicles in the parking area in front of the condo in a short time span. GA76-77, GA283-87, GA305. Fiorentino explained that Dais worked for the defendant—*i.e.*, that Dais would conduct drug sales with the defendants' customers. GA195-96.

Fiorentino then received a call from telephone number 203-606-7175 at the same time as DEA agents saw Dais placing a call on a phone. GA77. Fiorentino told Dais which car she was in and where she was parked. GA78. As Dais approached Fiorentino's car, agents identified themselves as law enforcement. GA306. Dais immediately took off running. GA79, GA291, GA306.

Dais ran through the front door of Unit 14E, up a small set of stairs to the main living area of the condominium, through a screen door, and onto the back deck. GA306-307. Once on the deck, he kept running and jumped off the deck, landed, and continued to run. GA294, GA307-308. Several agents followed Dais in pursuit; officers eventually managed to stop Dais and arrest him after a lengthy chase. GA296. During the course of the chase, agents saw Dais throw a cellular telephone into some bushes. GA307. Agents seized the telephone, and determined that it was number 203-606-7175—the same number that JB had called on the night of her death, the same number that Fiorentino had identified as the "work phone" to buy heroin, and the same number that Fiorentino used to call the defendant earlier in the day to buy heroin. GA745; Ex. 9.

As some DEA agents were chasing Dais off the back deck of Unit 14E, other agents who had followed Dais into the condominium went downstairs and found the defendant sitting upright in a chair, asleep. GA309-310. In plain sight, on the defendant's stomach, were several dozen "folds" of what looked like heroin and several dozen baggies of what appeared to be crack cocaine. GA311; Govt' Exs. 10A, 10B, 11. Several of the heroin folds had the stamp of "Takers." Gov't Exs. 10A, 10B.

Although agents had hoped that Brodsky would be with the defendant, he was not in the condominium that day. GA85-86. Later that day, agents found Brodsky at a friend's house and arrested him. GA86. Scattered around the bedroom where agents found Brodsky were dozens of empty wax folds stamped "Takers." GA86-87; Gov't Ex. 14.

3. Co-conspirators describe the heroin conspiracy

Both Fiorentino and Brodsky eventually pleaded guilty to conspiracy to possess with the intent to distribute heroin and cooperated with the Government. Both testified at trial. They explained that, during several months in 2011, the defendant and Brodsky, together with other co-conspirators, were selling heroin to a variety of customers in and around the New Haven area. GA168-69, GA175-76.

According to Brodsky, about two and a half years prior, he began purchasing heroin in New Haven from an individual named "Fig," who later introduced him to the defendant, who was known to him as "Chris." GA390-92. Brodsky then began purchasing heroin directly from the defendant. GA393. Brodsky explained that he then became involved in the conspiracy, selling heroin for Fig and the defendant from his own apartment. GA396, GA403 ("I would run outside

to get the customers, and take the money and bring it back . . . I would give it to Chris.").

At some point after he began selling heroin for Fig and the defendant, Brodsky suggested to them that they should get their heroin directly from New York because it would be cheaper and of a better quality. GA403-404. Brodsky, who had a significant heroin habit, offered to test the quality of the heroin. GA404. Fig and the defendant agreed with Brodsky's plan. GA404. Brodsky, with cash supplied by Fig, began making trips to New York to get the heroin and to carry it back to Connecticut. GA406-407. Brodsky was accompanied by a friend of Fig's whom he knew as "Bamboo." Bamboo would carry the money for the heroin. Brodsky testified that on his first trip alone, he brought back 3,000 to 4,000 bags of heroin. GA406.

The defendant and Brodsky would sell heroin that Brodsky got in New York from hotel rooms in the area, and would have others rent hotel rooms in their names. GA176-77, GA407-408; *see also* Gov't Ex. 17, 18, 23, 24, and 26A (hotel records). The defendant would pay for the hotel rooms in cash. GA178, GA407. The heroin sold by the conspiracy was "stamped," and in the summer of 2011 included heroin stamped "Takers" and "Roadkill." GA170-71.

Customers would reach either the defendant and/or Brodsky by calling the "work phone," 203-606-7175. GA171, GA406-407. Brodsky testified

that the defendant paid for the "work phone." GA426-27. The defendant also had his own personal phone that he used. GA426. The toll records for the "work phone" showed that the phone was involved in significant activity, consistent with large amounts of drug trafficking. The phone had 145 contacts and, on any given day, received a large volume of calls. GA498. For example, on August 15, 2011 alone, the phone received 206 incoming calls; 179 of these calls were less than 30 seconds in duration. *See* GA524-25.

At the end of each day, Brodsky would give the cash from the heroin sales that he made to the defendant. GA186. Brodsky estimated that that he alone would typically sell 50 to 75 bundles, or 500 to 750 bags of heroin, each day for the defendant. GA407, GA409. The defendant, in turn, would pay Brodsky by giving him bags of heroin for his own personal use. GA185-86, GA189, GA409. The defendant would yell at Brodsky if the money was short at the end of the day. GA184-85.

Fiorentino's testimony corroborated much of the testimony of other witnesses. She explained that the defendant and Brodsky were her "steady source" for heroin in about March of 2011. GA162. She explained that she first began buying heroin from Brodsky, and was then introduced to the defendant, who worked with Brodsky. GA164-65, GA168. Fiorentino testified that she was with Brodsky almost "every day"

starting in about March of 2011, and that she would see him sell heroin every day to an average of 50 customers per day. GA168-80. Fiorentino also testified that she was with the defendant about "every other day," and saw him sell to the same average number of customers. GA169, GA180. According to Fiorentino, Brodsky and the defendant would occasionally run out of heroin to sell, but would get more heroin within a few hours. GA190-91.

Fiorentino explained that she and her friend, Amanda, would often do favors for the defendant and Brodsky in exchange for heroin, such as renting rooms for them, running drugs out to customers, and giving them rides in her car. GA172-77. Fiorentino testified that, despite the fact that the defendant had his own condominium, he would rent hotel rooms "every night." GA172, GA177-78.

Fiorentino confirmed that on she had rented room 503 at the Best Western for Brodsky on the night of August 15, 2011, GA188, and that she saw the defendant give Brodsky the cash to pay for the room. GA187-88. Fiorentino was also with the defendant that same day, and saw him selling drugs next door at the Hampton Inn, where he registered under an alias. GA188, GA486-88; Gov't Ex. 26A (hotel records).

In addition to the testimony of the cooperating witnesses about the defendant's significant amounts of heroin dealing, the Government also

introduced evidence of the defendant's tens of thousands of dollars in unexplained wealth at trial. The defendant had no reportable income over the last several years, *see* GA512-13; Ex. 25 (Department of Labor records), yet had approximately $75,000 of buy-ins at the Mohegan Sun casino, including $14,800 of buy-ins in July of 2011 and $22,315 of buy-ins in August of 2011. GA364; Gov't Ex. 16. Fiorentino testified that she went with the defendant to the casino on one occasion, where he complained that he "blew" $3,000 before getting more cash out of his car. GA182-83.

B. The indictment and trial

As described above, the defendant was arrested on September 7, 2011 when he was found in the possession of heroin and crack cocaine. *See* A2. On September 14, 2011, a grand jury sitting in New Haven, Connecticut, returned a three-count indictment charging the defendant with conspiracy to possess with the intent to distribute heroin, in violation of Title 21, United States Code, Sections 841(a)(1), 841(b)(1)(C), and 846, possession with intent to distribute heroin, in violation of Title 21, United States Code, Sections 841(a)(1) and 841(b)(1)(C), and possession with intent to distribute crack cocaine, also in violation of Title 21, United States Code, Sections 841(a)(1) and 841(b)(1)(C). A3, A18-20.

The defendant moved to suppress the drugs that were found on him when he was arrested. A6. After an evidentiary hearing on the motion, the district court denied the motion to suppress. A6, A9, A63.

A jury trial was held in Hartford, Connecticut, before the Hon. Vanessa L. Bryant, United States District Judge. Evidence began on May 18, 2012. A7. On May 29, 2012, the jury found the defendant guilty of all three counts of the indictment. A8.

C. The sentencing

Following the jury's verdict, the Government stated that it would ask the district court to consider the fact of JB's death in fashioning the appropriate sentence for both the defendant and Brodsky. The Government represented that it would ask the district court to: (1) apply a enhanced base offense level as a result of the overdose death under U.S.S.G. § 2D1.1(a)(2), which sets forth an enhanced base offense level of 38 if the "the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance[;]" and/or (2) ask the district court to upwardly depart under U.S.S.G. § 5K2.1, which provides that "[i]f death resulted, the court may increase the sentence above the authorized guideline range."

On August 21, 2012, the district court held an evidentiary hearing on the issue of whether or

not the heroin sold by the conspiracy caused JB's death and took the matter under advisement. A9.

On January 28, 2013, the district court concluded that the Government had met its burden in showing that the heroin sold by the defendant and Brodsky caused JB's death, but that it would not use the enhanced base offense level under U.S.S.G. § 2D1.1(a)(2). The district court, however, explained that it would "take into consideration that death, either for purposes of an upward departure or for purposes of identifying offense characteristics or related conduct, in fashioning an appropriate sentence, which is reflective of the defendant's conduct and the impact of that conduct." 1/28/13 Tr. at 7-8.

On August 26, 2013, the final Pre-Sentence Report ("PSR") was filed. The PSR concluded that the defendant's base offense level was 32 based upon the quantity of heroin involved in the conspiracy, which the PSR determined to be at least one kilogram of heroin. PSR ¶ 29.

The PSR also included a two-level enhancement for the defendant's role in the conspiracy, concluding that the defendant acted as a "leader, manager, or supervisor" under U.S.S.G. § 3B1.1(c). PSR ¶ 31.

The PSR concluded that the defendant was in criminal history category II based upon his conviction for interfering/resisting arrest and the

fact that he was serving a term of conditional discharge at the time he committed the offense. PSR ¶¶42, 44. The PSR also noted that the defendant had felony convictions for possession of a weapon in a motor vehicle, PSR ¶ 38, and for sexual assault in the second degree, PSR ¶ 30.

Based upon a total offense level of 34 and a criminal history category of II, the PSR calculated the advisory Guidelines range as 168 to 210 months of imprisonment. PSR ¶ 65.

On May 14, 2013, the district court held Williams's sentencing hearing. A14. The district court first addressed the defendant's objection to the quantity of heroin set forth in the PSR, as well as the Guidelines enhancement for the defendant's role as a manger or leader of the conspiracy. The district court concluded that the PSR's conclusions were supported by "more than a preponderance of the evidence," and adopted the facts set forth in the PSR as its own findings. A233-34.

The Government advocated for a sentence of 210 months, the top of the Guidelines range, to 240 months, the statutory maximum, based upon the fact of JB's death. The Government largely based its argument on the fact that the defendant continued to deal heroin even after learning of JB's death. A235-36. JB's mother then spoke, addressing the impact of JB's overdose death on her family. A237-38.

The defendant spoke on his own behalf, admitting "I accept my responsibility for the mistakes that I made . . . I was involved in drugs. I do not deny that." A245. The defendant went on to say, however, that he had tried to get Fiorentino and Brodsky to quit heroin, and that he had tried to get JB to stop using drugs and into rehab. A246-47. The defendant explained "I'm not a big drug dealer . . . I'm not a leader in drugs. I've had my experiment with it. I've made my mistake . . . ." A248.

The district court then imposed sentence. First, the court noted that it had to consider the factors set forth in section 3553(a). In this context, the district court considered the seriousness of the offense, noting the overdose death of JB. The district court explained:

> The Court often has the occasion, unfortunate though it is, to sentence a drug dealer, and I typically talk about the effects that drugs have on community, but this is one sentencing where I need not saying anything, because the statement of [JB's] mother says it all. The statements of Mr. Williams' family members say it all, because dealing drugs is one of the most pernicious, the most devastatingly dangerous things that a person can do.

A249-50.

The district court also considered the defendant's history and character, noting the defendant's prior convictions and the fact that several of his prior sentences "have shown leniency[,]" including his suspended sentences for his weapons conviction and his sexual assault conviction. A250.

The district court remarked that the defendant was a "mature grown man," who had a self-described, "wonderful . . . beautiful life." A251. The district court rejected the defendant's assertion that he had tried to help Brodsky, Fiorentino and JB with their addictions, noting: "I can't conceive of how an individual could help an addict by facilitating their sale of drugs . . . To think that you could use a drug addict to sell your drugs for you and at the same time believe that you were trying to help them to get off of drugs shows a lack of understanding and empathy that is inconceivable." A251.

The district court then discussed the need for the sentence imposed to protect the public, and to provide deterrence to the defendant and others. The district court stated, "Too often the Court hears that an individual chooses to sell drugs because they lost their job or couldn't make ends meet or some other reason . . . The consequence needs to be grave enough for a person to at least think about whether it's worth it." A252.

After determining the base offense level and the defendant's criminal history, the district court calculated the advisory Guidelines range as 168 months to 210 months of incarceration. A253. The district court noted that the range "is neither mandatory nor is it presumed to be reasonable," but that "taking into consideration the totality of the record in this case," the district court would impose a sentence at the bottom end of the range, 168 months. A254. The district court also imposed a three-year term of supervised release, and a $100,000 fine to be paid if the defendant re-entered the country after his deportation. A254-55.

Judgment entered on May 15, 2013. A14. On May 22, 2013, the defendant filed a timely notice of appeal. A14, A263.

Summary of Argument

I. The district court properly concluded that the defendant had no standing to challenge the search of the condominium in which he was found. The defendant was just a "casual visitor" at the residence, was not an overnight guest there, and had no possessory or proerpty interest in the condo.

II. The district court's conclusion that the defendant should receive a two-level enhancement for his role as a manger, supervisor or leader of the conspiracy was supported by the overwhelming evidence that the defendant directed others

where and when to sell heroin, paid others to sell heroin, collected money at the end of the day, and used others to rent hotel rooms and do other favors in exchange for cash and drugs.

III. The district court properly concluded that the defendant was responsible for at least one kilogram of heroin, where there was a detailed factual finding supporting this quantity that relied upon the testimony of two cooperating witnesses, seized narcotics, observations of law enforcement officers, and hotel and casino gambling records.

Argument

I. The district court properly concluded that the defendant had no standing to challenge the search of the condominium where he was merely present in the condo, and was not an overnight guest.

A. Relevant facts

On April 5, 2012, prior to trial, the defendant filed a motion to suppress the evidence seized from him on his day of arrest. A6. The defendant argued that the warrantless entry into Unit 14E on the day of his arrest violated his Constitutional rights. In response, the Government argued that the defendant lacked standing to challenge the entry because he had not alleged or demonstrated an expectation of privacy in Unit 14E. The Government also argued that the entry

into Unit 14E fell within the exigent circumstances exception to the warrant requirement because of the hot pursuit of Dais and the officers' reasonable belief that drug dealing was occurring in the condominium. Finally, the Government argued that the search was a permissible protective sweep of Unit 14E during the process of Bruce Dais's arrest.

On May 2, 2012, the district court held an evidentiary hearing on the motion to suppress. A7.

At the hearing, the defendant testified that the condominium belonged to his friend, Dais, and his mom, whose name he could not recall. A41. The defendant testified that he had been at the condo on September 6th but had left between 10pm and 11pm to go gambling at the casino. A41-42. According to the defendant, Dais asked him to return to Dais's condo after he finished at the casino, explaining, "I was staying the night there." A42. The defendant testified that he stayed at the casino until about 5:00 or 5:30 am on September 7th and then returned back to the condo around 7:00 am. A42-43.

On cross-examination, the defendant testified that he had known Dais for a "couple of years," that he had stayed at Dais's condo "numerous times," but then testified that he had actually only been at the condo during the past "couple of weeks" before his arrest. A45. The defendant agreed that he did not have a key to the condo and did not have a key to the room where he was

found. A45. The defendant described the room where he was staying as a "bedroom," but agreed that he was not asleep on a bed but instead on a couch. A46-47. The defendant also testified that he was fully clothed at the time of his arrest, and was not undressed or in pajamas. A53. The defendant conceded that he lived a short distance away at 40 Webster Street in New Haven, which is where he got his mail and where his girlfriend and children lived. A47-48.

After the defendant testified, the district court concluded that the defendant had not met his burden of showing standing to challenge the search. The district court found that the defendant was just "a casual visitor on the premises" explaining as follows:

> The defendant resided a short distance away from the premises. The Court has heard no reason why he would not be sleeping at his own home. While he claims to have been a periodic overnight visitor at the home, he admits that the home is owned by Mr. Dais' mother and can't even remember her name.
>
> The room in which he was found is the bedroom of Mr. Dais. The Court finds it incredulous to belive that Mr. Dais and Mr. Williams were cohabitating in that room which was apparently also used by a child on occasion.

> Mr. Williams was not there overnight; he was there the prior day. He left and came back. He wasn't asleep in a bed. There was lots of clothing in the room, some clothing on the bed. He was fully clothed, sitting up. He had no independent means of access, either to the condominium or to the room. And there's no indication that he was, in fact, as he claims an "overnight visitor" residing for any significant period of time on those premises.

A63. The district court declined to reach the Government's other arguments, specifically that the entry into the condominimum was lawful under the exigent circumstances of the arrest, and that the search of the condominimum was a permissible search incident to arrest. A63.

B. Governing law and standard of review

"The touchstone of the Fourth Amendment is reasonableness, and the reasonableness of a search is determined by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests." *United States v. Knights*, 534 U.S. 112, 118-19 (2001) (internal quotation marks and citations omitted); *see also Terry v. Ohio*, 392 U.S. 1, 9 (1968) (concluding that the Fourth Amendment does not prohibit

all searches and seizures, but only those that are "unreasonable"). "The Fourth Amendment protects the right of private citizens to be free from *unreasonable* government intrusions into areas where they have a legitimate expectation of privacy." *United States v. Newton*, 369 F.3d 659, 664 (2d Cir. 2004) (emphasis added). "Absent a reasonable expectation of privacy, . . . the warrant requirement is inapplicable and the legitimacy of challenged police conduct is tested solely by the Fourth Amendment's requirement that any search or seizure be reasonable." *United States v. Gori*, 230 F.3d 44, 50 (2d Cir. 2000).

The Fourth Amendment "protects people, not places." *Katz v. United States*, 389 U.S. 347, 351 (1967). As a consequence, "[i]t has long been the rule that a defendant can urge the suppression of evidence obtained in violation of the Fourth Amendment only if that defendant demonstrates that *his* Fourth Amendment rights were violated by the challenged search or seizure." *United States v. Padilla*, 508 U.S. 77, 81 (1993) (per curiam) (emphasis in original); *see also United States v. Watson*, 404 F.3d 163, 166 (2d Cir. 2005) (noting that defendant bears burden of showing that he has standing to contest search). That is, a defendant must make some showing that he had a reasonable expectation of privacy in the location or items to be searched. *See Rakas v. Illinois*, 439 U.S. 128, 143 (1978). To demonstrate standing, it is not enough that a de-

fendant is "legitimately on the premises" when the search in question occurs. *Id.* at 142-43. Instead, the defendant must show some other connection to the premises, such as a property or possessory interest in the area searched—for example, the right to exclude others. *Id.* at 143, n.12. Thus, while an invited, overnight guest may claim a reasonable expectation of privacy in a home, *see Minnesota v. Olson*, 495 U.S. 91, 96-97 (1990), "one who is merely present with the consent of the householder may not." *Minnesota v. Carter*, 525 U.S. 83, 90 (1998); *see also United States v. Jimenez*, 789 F.2d 167, 170 (2d Cir. 1986) (holding that a defendant who had "occasional access" to an apartment did not have standing to challenge a seizure).

"When evaluating a district court's [denial] of a motion to suppress evidence," this Court reviews the district court's "findings of fact for clear error, considering them in the light most favorable to the government,"[2] *United States v. Julius*, 610 F.3d 60, 64 (2d Cir. 2010), and reviews questions of law and mixed questions of law and fact *de novo*, *id.*; *United States v. Lucky*,

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[2] There is some disagreement in the Second Circuit as to whether the court's findings should be viewed in the light most favorable to the government, or in the light most favorable to the prevailing party. *See United States v. Wilson*, 699 F.3d 235, 242 n.3 (2d Cir. 2012) (citing cases on both sides of the issue). Here, that distinction does not matter.

569 F.3d 101, 105-106 (2d Cir. 2009). "A finding is clearly erroneous when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *United States v. Iodice*, 525 F.3d 179, 185 (2d Cir. 2008) (internal quotations omitted).

C. Discussion

Here, the district court properly concluded that the defendant did not demonstrate standing to challenge law enforcement's entry into Unit 14E. The defendant was not an "overnight" guest at the condominium, but was merely present there with the consent of the homeowner.

As district court held, the defendant did not meet his burden of establishing facts to support his assertion that his own Fourth Amendment rights were violated by the entry into, and the limited search of, Unit 14E on September 7, 2011. *See United States v. Osorio*, 949 F.2d 38, 40 (2d Cir. 1991) (explaining that the party moving to suppress bears the burden of showing standing to challenge the search); *Watson*, 404 F.3d at 166. While the defendant claimed he was an "overnight guest" at the residence, the defendant's own testimony established that he had not spent the night in the condominium, but in-

stead had been at the casino over the course of the night. A41-42. Thus, the district court properly concluded that the defendant was just a "casual visitor" to the home, without standing to challenge the entry.

As the Supreme Court has made clear, "one who is merely present with the consent of the householder," without more, may not claim the protection of the Fourth Amendment." *Carter*, 525 U.S. at 90. In *Carter*, the Supreme Court held that the defendants, who were solely in an apartment to package cocaine "were obviously not overnight guests, but were essentially present for a business transaction and were only in the home a matter of hours." *Id.* Thus, the Court concluded, the defendants did not have standing to challenge the search. Similarly, the record before the Court here shows, at best, that the defendant may have been a temporary guest inside of the home on the day of the entry; however, the defendant's mere presence, without more, is insufficient to establish a reasonable expectation of privacy.

In addition, the district court properly found that the defendant had not asserted any connection to the condominium other than the fact that he was there with the homeowner's assent. To demonstrate standing, it is not enough that a defendant is "legitimately on the premises" when the search in question occurs. *Rakas*, 439 U.S. at 142-43. Instead, the defendant must show some

other connection to the premises, such as a property or possessory interest in the area searched. *Id.* at 143, n.12. Here, as the district court noted, the evidence demonstrated that the defendant did not have a connection to the condominium, much less a property or possessory interest to Unit 14E. The defendant had his own home a short distance away from the condo and offered no explanation as to why he was at Unit 14E. A63. Moreover, the defendant could not recall the actual homeowner's name, had no independent means of access to the unit, was fully clothed at the time of the search, and was asleep sitting up in Mr. Dais's bedroom, suggesting that he had just casually fallen asleep, and was not laying down to go to sleep. A63.

The defendant's suggestion that anyone who falls asleep in a room has an automatic expectation of privacy in that room, *see* Def. Br. 11, would create an exception that would swallow the requirement to show standing. People may fall asleep in all sorts of places (*e.g.*, airports, waiting rooms, public transportation), in all sorts of circumstances. The Fourth Amendment, however, only protects people against "unreasonable government intrusions into areas where they have a *legitimate* expectation of privacy." *Newton*, 369 F.3d at 664 (emphasis added); it does not protect people in all areas where someone might later *wish* to claim was private. Moreover, as the district court found, the defendant

had not settled himself into bed at the condominium to go to sleep for the night—the defendant was not even in a bed, but instead was a casual visitor who appeared to have nodded off "fully clothed, sitting up." A63. Those findings are fully supported by the record, and accordingly are not clearly erroneous.

Like the defendants in *Carter*, the evidence demonstrated that here the defendant was only present in Unit 14E, in all likelihood for a "business transaction," *i.e.*, to sell drugs, and thus did not have a valid expectation of privacy to challenge officers' entry into the condo. 525 U.S. at 90. The district court's order denying the motion to suppress should therefore be affirmed.[3]

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[3] In addition to arguing that the defendant had no standing to challenge the search, the Government also argued that the search was justified under the exigent circumstnaces caused by Dais's flight from officers, and that the search was permissible as a search incident to arrest. The district court declined to reach these issues, A63, ruling only on the standing issue. As a result, the district court did not make any findings related to these separate arguments. Thus, if this Court were to disagree with the district court's conclusion that the defendant did not have standing to challenge the search, the Government would ask this Court for a limited remand to allow the district court to make findings on the alternate grounds offered by the Government to justify the entry into the condominimum.

II. The district court correctly applied a Guidelines enhancement based upon the defendant's role as a leader, manager, or supervisor of the conspiracy.

A. Relevant facts

The PSR concluded that the defendant should receive a two-level enhancement under U.S.S.G. § 3B1.1(c) because of his role as a leader, manager, or supervisor in the conspiracy.

The PSR rejected the defendant's assertion that he and Brodsky were "partners," and thus that the role enhancement should not apply, noting that "Mr. Williams directed Mr. Brodsky where to sell the heroin, collected the proceeds at the end of each day, was in control of the 'work phone,' paid Brodsky in cash or bags of heroin for selling drugs, and would argue with Brodsky if the money was not correct. [The defendant] also used [Fiorentino and others] to rent hotel rooms used by the conspiracy, and used Bruce Dais as a 'runner.'" PSR Second Add. p.2.

At the sentencing hearing, the district court agreed with the PSR's conclusion that the evidence supported a role enhancement for the defendant. The district court explained that "there's more than a preponderance of the evidence to establish that Mr. Williams was, in fact, a leader, supervisor of this criminal enterprise." A233. The district court noted that the defend-

ant "doled out drugs on a daily basis to Jason Brodsky and others to sell [,]" and that "he held them accountable for producing to him at the end of the day the sale value of those drugs." A233. The district court also noted that the defendant directed people to rent hotel rooms and gave them the cash to pay for the rooms. A233. The court also explained that the defendant directed Brodsky to go to New York to get heroin, and that there was therefore "ample evidence on the basis of those and other facts introduced both at trial at and at the [August 23, 2012] hearing to establish that Mr. Williams was a leader of this criminal conspiracy." A233-34.

B. Governing law and standard of review

Section 3B1.1(c) of the Sentencing Guidelines sets forth a two-level enhancement if "the defendant was an organizer, leader, manager, or supervisor" in any criminal activity. A defendant is properly considered a manager or supervisor under § 3B1.1(c) "if he exercised some degree of control over others involved in the commission of the offense . . . or played a significant role in the decision to recruit or to supervise lower-level participants." *United States v. Blount*, 291 F.3d 201, 217 (2d Cir. 2002) (internal quotation marks, alterations and ellipsis omitted).

It is sufficient under 3B1.1 for the defendant to have managed or supervised just one other participant in the conspiracy. *United States v.*

Al–Sadawi, 432 F.3d 419, 427 (2d Cir. 2005); *see also United States v. Garcia*, 413 F.3d 201, 223-224 (2d Cir. 2005) (concluding that the recruitment of a single drug courier could be sufficient to warrant the enhancement). The Sentencing Commission explained that the role enhancements are available primarily to address "concerns relative responsibility." U.S.S.G. § 3B1.1, background.

This Court reviews a district court's determination that a defendant deserves a leadership enhancement under § 3B1.1 *de novo*, but reviews the district court's factual findings only for clear error. *United States v. Hertular*, 562 F.3d 433, 449 (2d Cir. 2009).

C. Discussion

Here, the evidence clearly demonstrated that the defendant exercised a level of control over others in the conspiracy, and thus the district court correctly applied the two-level enhancement under U.S.S.G. § 3B1.1(c).

First, the evidence showed that the defendant directed Brodsky where to sell the heroin, collected Brodsky's heroin proceeds at the end of each day, was in control of the work phone Brodsky used to communicate with customers, paid Brodsky with cash or bags of heroin for selling the drug, and would argue with Brodsky when the money from the heroin sales was not correct. *See* GA185-189, GA409, GA426-427. As the dis-

trict court noted, the defendant "doled out drugs on a daily basis to Jason Brodsky and others to sell. He held them accountable for producing to him at the end of the day the sale value of those drugs." A233.

Next, the evidence also showed that the defendant used Fiorentino and others to rent hotel rooms that the conspiracy used to sell heroin. Fiorentino testified that the defendant would pay for these rooms, and that she agreed to rent the rooms as a favor to the defendant, and to receive bags of heroin from him. GA172, GA174-77. The district court noted "He directed them to rent hotel rooms and particular hotel rooms. He paid them or gave them the money to pay for the hotel rooms." A233.

Finally, the evidence showed that the defendant used co-defendant Bruce Dais as a runner for the conspiracy. Fiorentino testified that Dais would make drug sales for the defendant, and give the cash from the sales to the defendant. GA195-96. On the day of the defendant's arrest, law enforcement officers observed Dais doing just that—coming to and from his condominium to conduct hand-to-hand transactions, while the defendant waited inside of the condominium with the actual drugs. GA76-77, GA283-87, GA305.

Because all of these findings—about the defendant's supervision of Brodsky, about his management of Fiorentino's (and others') rental

of hotel rooms, and about the use of Dais as a drug seller—were all based on evidence in the trial record, the district court's findings were not clearly erroneous.

The defendant argues, nonetheless, that the evidence only showed that he was working "together" with others, and further that he did not manage, lead or supervise anyone. The defendant characterizes his actions as simply "interacting" with other conspirators. Def. Br. 12-13. These arguments simply ignore the evidence before the district court that the defendant paid Brodsky, Fiorentino, Dais, and others to sell heroin and to do favors in furtherance of his drug dealing in exchange for heroin and cash. Undoubtedly the defendant was working "together" with his co-conspirators, but it was the defendant who was organizing, directing, and supervising their actions.

Based upon the ample evidence before it, the district court properly concluded that the defendant led, managed or supervised others and thus properly applied the two-level role enhancement under U.S.S.G. § 3B1.1.

III. The district court properly calculated the drug quantities attributable to the defendant.

A. Relevant facts

The PSR estimated that the quantity of heroin involved in the conspiracy and reasonably foreseeable to the defendant was at least one kilogram, but less than three kilograms. PSR ¶ 29.[4] The PSR made a detailed finding concerning this quantity of heroin, detailing the following evidence from the trial:

First, the PSR set forth that the heroin seized from Williams on the day of his arrest was 5.3 grams total, contained in 120 individual folds, or an average of .0441 grams of heroin per bag. PSR ¶ 20.

Next, the PSR cited to Jason Brodsky's trial testimony that he would sell 50 to 75 "bundles," *i.e.*, 750 individual bags, of heroin a day for the defendant. PSR ¶ 21; *see also* GA409. The PSR reasoned that 750 bags at .04 grams per bag would approximate to 30 grams of heroin in a single a day. The PSR set forth that this would result in 930 grams of heroin being sold during the month of August 2011 alone, and noted the conspiracy lasted over the course of several months. PSR ¶ 21.

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[4] The PSR did not provide a separate quantity analysis for the crack cocaine that the defendant had on him at the time of his arrest.

The PSR also noted that Fiorentino testified that she was with Jason Brodsky "almost every day" in the March/April 2011 timeframe, and that she would see Brodsky sell heroin every day to an average of 50 customers. The PSR concluded that, based upon Fiorentino's observations alone (50 customers a day for the seven month time period of March 2011 through September of 2011), there was ample evidence to conclude that over one kilogram of heroin was involved in the conspiracy. PSR ¶ 23.

In addition, the PSR noted there was independent evidence to corroborate both Brodsky and Fiorentino. The PSR noted law enforcement observations, including the multiple hand-to-hand drug transactions observed on the August 15, 2011 Best Western hotel surveillance video, the multiple transactions in the parking lot of 40 Foxon Drive on September 7, 2011 before the defendant and Bruce Dais were arrested, and the number of contacts in the "work phone" seized by police, which was 145 people. PSR ¶ 23.

Finally, the PSR noted that the quantity of heroin was consistent with the unexplained wealth of the defendant. The defendant had no legitimate income reported during the year 2011, *see* Gov't Ex. 25 (State Dep't of Labor records), yet had approximately $75,000 in buy-ins at the Mohegan sun Casino, including buy-ins of $14,800 in July of 2011 and buy-ins of $22,315 in August of 2011. *See* Gov't Ex. 16 (Casino rec-

ords). The PSR also noted that Williams paid over $3100 in cash for hotel rooms in the summer of 2011, and had $550 in cash on his person on the morning of his arrest. PSR ¶ 24; Gov't Ex. 17, 18, 23 and 24 (hotel records).

Moreover, as set forth in the PSR, Fiorentino, who testified that she was with Brodsky and Williams during most of the spring and summer months of 2011, explained that the two always had heroin to sell and would only run out of heroin for a few hours. PSR ¶ 14; GA190.

The defendant objected to the quantity of heroin calculated in the PSR, arguing an alternative calculation using an abbreviated time frame for the conspiracy of July 28, 2011 through September 7, 2011 based upon a DEA report that Fiorentino met the defendant sometime in July of 2011. Under this theory, the defendant argued that the 5.3 grams of heroin that he was seized with should be multiplied only by 48 days, for a total of 254.4 grams. *See* PSR Add. The PSR rejected this argument, noting that even if Fiorentino's testimony were set aside, Jason Brodsky testified that he began purchasing heroin from the defendant in 2009, long before the March 2011 starting point in the PSR.

At sentencing, the district court acknowledged the defendant's challenge to the drug quantity determination set forth in the PSR, and concluded, "[o]n the basis of the testimony presented by witnesses here in this court, including

Alana Fiorentino and Jason Brodsky," that "the quantity of drugs reflected in the presentence report is amply supported by the evidence and is a conservative estimate based upon that evidence. The Court further finds that the evidence is ample." A233. Accordingly, the district court adopted the facts stated in the PSR as to drug quantity "as its findings of fact." A233-34.

B. Governing law and standard of review

"A Sentencing Guidelines calculation must begin with an identification of the defendant's relevant conduct, which in the case of a drug possession offense includes the quantity of drugs controlled by the defendant, whether as a principal or as an aider and abettor." *United States v. Jones*, 531 F.3d 163, 174-75 (2d Cir. 2008). "Determining drug quantity is a task for the sentencing court, and in performing that task it is not bound by jury findings or evidence presented at trial, but may consider any reliable proof." *United States v. Shonubi*, 998 F.2d 84, 89 (2d Cir. 1993) (internal citations omitted).

Section 2D1.1 of the Sentencing Guidelines sets forth the base offense levels for drug convictions, which levels are determined in part by the drug quantity table found at section 2D1.1(c). The drug quantity table sets forth a graduated scale of offense levels based upon the weight of the drugs involved in the offense. With respect to

drug quantity determinations in conspiracy cases, "[a] defendant convicted for a 'jointly undertaken criminal activity' such as [a drug trafficking conspiracy], may be held responsible for 'all reasonably foreseeable acts' of others in furtherance of the conspiracy." *United States v. Snow*, 462 F.3d 55, 72 (2d Cir. 2006). Thus, a defendant need not actually know the exact quantities involved in the conspiracy; instead, "it is sufficient if he could reasonably have foreseen the quantities involved." *Id.*

In drug conspiracy cases such as the instant one, the offense of conviction spans a time period and a large number of transactions. If the district court finds that the drugs seized by law enforcement under-represent the actual amount of narcotics sold, "a district court must estimate the amount of drugs involved in a crime for sentencing purposes, [and] that estimation 'need be established only by a preponderance of the evidence.'" *United States v. McLean*, 287 F.3d 127, 133 (2d Cir. 2002) (quoting *United States v. Prince*, 110 F.3d 921, 925 (2d Cir. 1997)); *see also* U.S.S.G. section 2D1.1, Note 12. In making such an estimate, "a sentencing court may rely on any information it knows about, including evidence that would not be admissible at trial, as long as it is relying on 'specific evidence—*e.g.*, drug records, admissions, or live testimony.'" *McLean*, 287 F.3d at 133 (citing U.S.S.G. § 6A1.3 and *United States v. Brinkworth*, 68 F.3d 633, 641

(2d Cir. 1995), and quoting *United States v. Shonubi*, 103 F.3d 1085, 1087 (2d Cir. 1997)); *see also United States v. Blount*, 291 F.3d 201, 215 (2d Cir. 2002) ("In making such an estimate [of drug quantity], the court has broad discretion to consider all relevant information . . . [and] the court is not restricted to accepting the low end of a quantity range estimated by a witness.").

Estimates of total drug quantity based upon extrapolation from seized quantities are permissible if they are reasonable. For example, in *Prince*, this Court held that the district court permissibly calculated the weight of six missing boxes of marijuana based upon the lowest weight of the 42 boxes actually recovered by law enforcement. 110 F.3d at 925. This Court explained that the estimate for the six missing boxes "derived from the fact that the weight of each of the forty-two recovered boxes ranged from fifty to ninety pounds, [and] was a reasonable figure based on reliable evidence." *Id.* Similarly, in *United States v. Pirre*, 927 F.2d 694, 696 (2d Cir. 1991), this Court concluded that the district court permissibly relied on an expert's method of using the weight of two bricks of cocaine to determine the weight for 15 bricks of cocaine, explaining "[the expert's] testimony provided sufficient evidence for the district court to conclude that the estimate was reliable." *Id.*

This Court has instructed that a district court "satisfies its obligations to make findings

[with respect to drug quantity] sufficient to permit appellate review . . . if the court indicates, either at the sentencing hearing or in the written judgment, that it is adopting the recommendations in the presentence report." *Prince*, 110 F.3d at 924.

When a defendant makes a timely objection to the drug quantities set forth in the PSR, this Court will nonetheless affirm a district court's finding of fact relating to a sentencing issue unless it was "clearly erroneous." *United States v. Hamilton*, 334 F.3d 170, 188 (2d Cir. 2003); *Prince*, 110 F.3d at 924. This Court gives "due deference" to a district court's application of the Sentencing Guidelines to the facts. *Hamilton*, 334 F.3d at 188.

C. Discussion

The district court's finding that the PSR set forth an accurate assessment of the heroin quantity attributable to the defendant (at least one kilogram of heroin) was amply supported by evidence before the district court.

To begin, the PSR noted that the defendant had about 5.3 grams of heroin on his person at the time of his arrest, which had been packaged into 120 individual bags (or .04 grams per bag). Eight of these same type of bags had been found at JB's house on the morning she passed away, GA719-20, and dozens of these empty bags had

been found at Brodsky's house on the day he was arrested, GA86-87.

According to Brodsky, he would typically sell 50 to 75 bundles, or 500 to 750 bags of heroin, each day for the defendant. GA409. As calculated by the PSR, this would result in about 930 grams of heroin sold by Brodsky in just one single month of the conspiracy. PSR ¶ 21.

The evidence at trial, however, established that the conspiracy lasted much more than the single month of August 2011, but instead involved a much longer period of time. Brodsky testified that he began purchasing heroin as a customer from "Fig" and then from the defendant years before the March of 2011 to September of 2011 timeframe used in the PSR. GA391-94. Brodsky explained that he became involved in the conspiracy, selling heroin for Fig and the defendant. *See* GA403 ("I would run outside to get the customers, and take the money and bring it back . . . I would give it to Chris."). Brodsky also testified that he then suggested to Fig and the defendant that they should get their heroin directly from New York because it would be cheaper and of a better quality. GA403-404. Brodsky, with money supplied by Fig, began making trips to New York to test the heroin and carry it back to Connecticut. GA406-407. Brodsky testified that on his first trip alone, he brought back 3,000 to 4,000 bags (which, at .04 grams per bag,

would equate to over 100 grams for this single trip). GA406.

As noted in the PSR, Brodsky's testimony was corroborated by Fiorentino, who testified that she was with Brodsky almost "every day" during the late spring/summer of 2011, and that she would see him sell heroin every day to an average of 50 customers per day. GA168-80. Fiorentino further testified that at the end of the day, she would see Brodsky turn over the cash from the heroin sales to the defendant, and that the defendant would "pay" Brodsky for selling the heroin. GA189-90. Fiorentino also testified that the two had heroin to sell each and every day, and that if they did run out of heroin, it would only be for a few hours. GA190-91. Fiorentino further explained that she was with the defendant about "every other day" during that same time period, and would also see the defendant sell heroin to about the same number of customers. GA169, GA180.

The defendant argues that the PSR and the district court erred in relying upon the testimony of Brodsky and Fiorentino. *See* Def. Br. 20. This argument is misplaced, however, because there was overwhelming independent evidence to corroborate their testimony as to scope of the conspiracy and the quantity of heroin involved.

First, the surveillance of the Best Western on August 15, 2011 showed multiple people in and out of the room that Fiorentino had rented for

Brodsky, which was indicative of drug sales. GA54-55; Gov't Ex. 5; PSR ¶ 23. Similarly, officers saw a number of multiple hand-to-hand transactions by Bruce Dais, the defendant's "runner," on September 7, 2011 outside of the 40 Foxon Drive condominium. GA76-77, GA283-87, GA305. One agent reported seeing four transactions in the few minutes that he was outside of the condo. GA283-87. These observations about a large volume of customers were consistent with the records for the "work phone," Gov't Ex. 9, which showed that the phone was involved in significant activity, consistent with large amounts of drug trafficking. The phone had 145 contacts and, on any given day, received a large volume of calls. For example, on August 15, 2011 alone, the phone received 206 incoming calls; 179 of these calls were less than 30 seconds in duration. *See* GA524-25; PSR ¶ 23.

Second, hotel records (Gov't Exs. 17, 18, 23, 24, 26A), showed that members of the conspiracy frequently rented rooms in the New Haven area, from which Brodsky and Williams would sell heroin. GA481-95. These records corroborated Fiorentino's testimony that the defendant and Brodsky would stay in hotels "every night" to sell heroin. PSR ¶ 24; GA177-78.

In addition, the unexplained wealth of the defendant, including the thousands of dollars spent on hotel rooms and the tens of thousands of dollars spent gambling is consistent with the signif-

icant amount of drug trafficking described by Brodsky and Fiorentino. The defendant had no reportable income over the last several years, *see* Ex. 25 (Department of Labor records), yet had approximately $75,000 of buy-ins at the Mohegan Sun casino, including $14,800 of buy-ins in July of 2011 and $22,315 of buy-ins in August of 2011. Gov't Ex. 16; GA357-58; PSR ¶ 24. In addition, the hotel records showed that the defendant spent over $3,000 in cash in hotel rooms in the summer of 2011, and Fiorentino reported being with the defendant when he "blew" $3,000 in a single night of gambling. GA358.

Thus, in accordance with this Court's mandate, the PSR's estimate of heroin quantity was reasonable and based upon specific evidence, including seized narcotics, the testimony of cooperating witnesses with first hand-knowledge of the defendant's activities, law enforcement observations, telephone records, and hotel and casino records. *See McLean*, 287 F.3d at 133 (instructing that a drug quantity estimate should be based upon "specific evidence" known to the court, including the testimony of cooperating witnesses who approximated the amount of narcotics they received from the defendant.).

The defendant offers a number of alternate methods that the district *should* have used to determine drug quantity, but each of the defendant's respective proposals fail and are contradicted by the evidence. Moreover, the defend-

ant cannot dispute that the district court, in its "broad discretion," reasonably relied upon the relevant evidence before it in estimating the quantity of heroin. *See Blount*, 291 F.3d at 215 ("In making such an estimate [of drug quantity], the court has broad discretion to consider all relevant information . . . [and] the court is not restricted to accepting the low end of a quantity range estimated by a witness.").

First, the defendant argues that the most accurate and reliable method would be to hold the defendant responsible only for the drugs on his person on the day of his arrest, or 5.3 grams of heroin. Def. Br. 17. This method, however, simply ignores this Court's requirement that a sentencing court identify a defendant's "relevant conduct," which in a drug conspiracy case includes the "reasonably foreseeable acts of others in furtherance of the conspiracy." *Snow*, 462 F.3d at 72. Indeed, this method would unfairly allow individuals like the defendant—who used others to sell drugs on his behalf—to escape liability for their underlings merely because they did not physically possess the drugs.

Next, the defendant argues that the estimate of quantity of heroin was unfair because there was no evidence that such an estimate was "actually reasonably foreseeable to [the defendant] over the course of the conspiracy." Def. Br. 17-18. This argument also fails because it is contradicted by the testimony cited to in the PSR and

adopted by the district court that the defendant sold heroin over many months to many customers using the help and assistance of others, including Brodsky, Fiorentino and Dais. PSR ¶¶ 14-15, 21-22.

Moreover, the defendant's suggestion that he only be held accountable for the quantity of drugs seized from his person multiplied by the days set forth in the indictment (Def. Br. 22-23) also ignores the fact that "relevant conduct" may include conduct that occurred outside of the precise dates charged in the indictment. *See United States v. Silkowski*, 32 F.3d 682, 688 (2d Cir. 1994). In *Silkowski*, the Court explained that conduct outside of the statute of limitations was properly considered as "relevant conduct" in the Guidelines calculation, along with "conduct for which the defendant was acquitted, conduct related to dismissed counts of an indictment, *conduct that predates that charged in the indictment*, and conduct not charged in the indictment." *Id.* (emphasis added). Of course here, the PSR and the district court used an abbreviated time period for the conspiracy (March of 2011 through September of 2011), when in fact Brodsky testified that the conspiracy dated back to at least 2009.

In addition, the defendant argues that he had "no knowledge and had no involvement" with the other individuals identified by Brodsky, including the co-conspirator identified as Fig, and thus

any activities by them were outside of the scope of the conspiracy. Def. Br. 19, 20. This assertion is flatly contradicted by the evidence. Brodsky testified that it was Fig who introduced him to the defendant, and that he came to work for both Fig and the defendant selling heroin. GA392-93, GA403. While Brodsky explained that the defendant did not personally participate in the New York trips, *see* GA406, in the context of Brodsky's testimony it is clear that Brodsky simply meant that the defendant himself did not personally go to New York. As Brodsky explained, when he returned from New York, he would give the heroin to Fig, but he would give the money he made from the heroin sales directly to the defendant. GA406-407. Clearly, then, each member of the conspiracy had his or her own roles. Thus, the district court did not err in concluding that the actions of Brodsky, which were in large part directed by the defendant, were within the scope of the defendant's conspiracy.[5]

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[5] In this connection, the defendant argues that the district court failed to make a "two-step inquiry" required by this Court's decision in *United States v. Johnson*, 378 F.3d 230 (2d Cir. 2004). *Johnson* did not involve a narcotics conspiracy, but instead was an extortion case. At sentencing, the district court applied a sentencing enhancement to one defendant based upon a murder that had been committed by a co-defendant. On appeal, this Court instructed that where relevant conduct is expanded to include acts

Finally, the defendant argues that the district court should have determined quantity based upon on the "conservative limits" of Fiorentino and Brodsky's testimony. Def. Br. 25-26. The defendant hypothesizes that the district court should have used the number of 30 customers a day over a 48 day conspiracy, and concluded that the total amount of heroin involved in the conspiracy was 132.48 grams. This calculation, however, is not supported by the evidence—including the testimony of the cooperating witnesses, the hotel records, and the evidence of the defendant's wealth—not is such a calculation required by the law. *See Blount*, 291 F.3d at 215 ("In making such an estimate [of drug quantity], the court has broad discretion to consider all relevant information . . . [and] the court is not restricted to accepting the low end of a quantity range estimated by a witness."). In this regard, this Court should give due deference to the dis-

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solely committed by a co-defendant, the district court is required to determine if 1) the scope of the activity to which the defendant agreed to participate was sufficiently broad to include the co-defendant's conduct and 2) that the co-defendant's conduct was reasonably foreseeable to the defendant. *Id.* at 236. Here, as set forth in great detail in the PSR and found by the district court, the evidence established not only that the heroin quantities identified by Brodsky and Fiorentino were reasonably foreseeable to the defendant but also that the defendant was personally and directly involved in those amounts.

trict court's conclusion that the quantity of one kilogram of heroin set forth in the PSR was a "conservative" estimate based upon the evidence. A233.

In sum, based upon the testimony of the cooperating witnesses, the seized narcotics, the observations of law enforcement, the telephone records, the hotel records, and the evidence of the defendant's unexplained wealth, the district court properly determined the quantity of heroin that was reasonably foreseeable to the defendant.

Conclusion

For the foregoing reasons, the judgment of the district court should be affirmed.

Dated: February 11, 2014

Respectfully submitted,

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Federal Rule of Appellate Procedure 32(a)(7)(C) Certification

This is to certify that the foregoing brief complies with the 14,000 word limitation of Fed. R. App. P. 32(a)(7)(B), in that the brief is calculated by the word processing program to contain approximately 11,254 words, exclusive of the Table of Contents, Table of Authorities, Addendum, and this Certification.

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